

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
WESTERN DIVISION

ROBERT L. BIGSBY

PLAINTIFF

vs.

Civil Action No. 3:92cv013-D-D

MARVIN T. RUNYON,  
Postmaster General; UNITED  
STATES POSTAL SERVICE; and  
NATIONAL RURAL LETTER  
CARRIERS ASSOCIATION

DEFENDANTS

MEMORANDUM OPINION

This matter is before the undersigned upon the motions of the defendants for summary judgment in this matter. Finding the motions well taken, they will be granted.

The pro se plaintiff Robert Bigsby originally filed the first of his four complaints in this cause in January of 1992. Acknowledging the proclivity of Mr. Bigsby to file these and other numerous and cumulative documents with the court clerk, this court issued an order dated December 23, 1992 which in part directed the plaintiff to file a final amended complaint which would supersede all other complaints. With the assistance of court-appointed counsel, this final complaint was filed by the plaintiff.<sup>1</sup> It is

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<sup>1</sup> This court has appointed counsel for the plaintiff on two occasions in hopes that this cause could be handled in a more proper and expeditious manner. However, both attorneys that were appointed by this court requested that they be permitted to withdraw. This court permitted both to withdraw, and the plaintiff is again proceeding pro se. This court attributes the excessive number of docket entries in this matter (over 150 at the time this opinion was drafted) to Mr. Bigsby's proficiency with a word processor, as well as his naming of defendants which were later properly dismissed from this suit.

this fourth and final amended complaint from which the court will draw the plaintiff's claims for purposes of the summary judgment motions at bar. Any other claims that the plaintiff might have argued or raised in other documents submitted to this court will not be considered in that they are not properly before this court.

#### SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). If the non-movant sets forth specific facts in support of allegations essential to his claim, a genuine issue is presented. Celotex, 477 U.S. at 327, 106 S.Ct. at 2554. "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,

587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); Federal Sav. and Loan Ins. v. Krajl, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the non-moving party. King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992).

#### FACTUAL BACKGROUND

While the factual background of this case and Mr. Bigsby's multiplicity of claims is too extensive to be discussed here, most of the relevant facts are not in dispute among the parties. Where facts are required for an analysis of the issues addressed in this opinion, they will be provided by the court.

#### DISCUSSION

##### I. LAW APPLICABLE TO THE PLAINTIFF'S CLAIMS

This court is in agreement with the defendants as to the applicable statutory provisions under Federal law which govern the plaintiff's claims in this cause. The plaintiff has apparently asserted several types of claims, but has failed to direct this court to all of the applicable statutory provisions. It is apparent to this court that the applicable provisions are:

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(c), under these facts governs exclusively for all of the claims involving discrimination claims based upon religion, sex and reprisal;

2. The Rehabilitation Act of 1973, 29 U.S.C § 791, et. seq., governs exclusively for all of the claims involving discrimination

based upon handicap;

3. The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a, governs exclusively for all of the claims involving discrimination based upon age; and

4. 39 U.S.C. § 1208(b) of the Postal Reorganization Act governs for all claims involving an alleged breach of any collective bargaining agreement as well as any claims of a breach of a duty of fair representation since the plaintiff's employer in this case is the United States Postal Service.

## II. PRELIMINARY REQUIREMENTS OF THE PLAINTIFF'S DISCRIMINATION CLAIMS

The plaintiff has asserted various claims of employment discrimination, apparently including discrimination based on religion, sex, and reprisal for prior activity. All of these claims are properly addressed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(c).

There are two preliminary requirements before a party is permitted to pursue a Title VII action in federal court: 1) the complaint must be filed within the time allotted by Title VII, and 2) the complainant must first have exhausted any administrative remedies. Tolbert v. United States, 916 F.2d 245, 247 (5th Cir. 1990). "Failure to comply with either of these requirements wholly deprives the district court of jurisdiction over the case; it is well settled law of this circuit that each requirement is a prerequisite to federal subject matter jurisdiction." Tolbert, 916

F.2d at 247 (citing Brown v. Department of the Army, 854 F.2d 77, 78 (5th Cir. 1988), and Porter v. Adams, 639 F.2d 273, 276 (5th Cir. 1981)). If the plaintiff in this case has not met these two requirements as to each of his Title VII claims, this court has no jurisdiction to hear those claims.

A. UNTIMELY FILING OF CLAIMS IN FEDERAL DISTRICT COURT

A federal employee who files an action under Title VII, such as the plaintiff, must file his complaint within ninety (90) days of receipt of a right-to-sue letter. Brown, 854 F.2d at 78; 42 U.S.C. § 2000e-16(c). The defendants have correctly noted that this requirement also applies to claims asserted under the Age Discrimination in Employment Act and for the claims based upon handicap. See. e.g., Honeycutt v. Long, 861 F.2d 1346, 1349 (5th Cir. 1988); 29 U.S.C. § 626(e). Because this timely filing is jurisdictional, it is not subject to waiver, estoppel, or equitable tolling. Munoz v. Aldridge, 894 F.2d 1489, 1494 (5th Cir. 1990). Turning to the claims in the case at hand, it is apparent to this court that the plaintiff has failed to assert some of his claims within the required time period. Notably, these claims are:

1) claims arising from the administrative case no. 3-C-1063-91. The right-to-sue letter was received by the plaintiff for these claims on June 24, 1992. Plaintiff did not attempt to assert these claims in this court until May 6, 1993, in ¶ 17 of the plaintiff's Fourth Amended Complaint.

2) claims arising from the administrative case no. 3-C-1263-92. The final administrative decision in this matter was rendered on October 23, 1992. Plaintiff did not attempt to assert these claims in this court until May 6, 1993, in ¶ 19 of the plaintiff's Fourth Amended Complaint.

3) claims arising from administrative case no. 3-C-1128-92. The plaintiff received his right-to-sue letter for these claims on September 19, 1992. The plaintiff did not properly present these claims before this court until May 6, 1993, in ¶ 18 of the plaintiff's Fourth Amended Complaint.

Successful assertion of all of these claims was contingent upon timely filing within the ninety day jurisdictional requirement. In that the time restrictions were not complied with, this court has no jurisdiction to hear those claims. There is no genuine issue of material fact as to these claims and the defendants are entitled to a judgment as a matter of law.

#### B. FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

As mentioned, the second jurisdictional requirement is that the plaintiff exhaust all administrative remedies before filing an action in federal district court. This exhaustion encompasses "compliance with the administrative review apparatus" of Title VII, and includes the timely filing of an administrative complaint. See Ray v. Freeman, 626 F.2d 439, 442 (5th Cir. 1980). This requirement is also applicable under the Rehabilitation Act, and

under these facts it is applicable under the ADEA as well. Prewitt v. U.S.P.S., 662 F.2d 292, 303-304 (5th Cir. 1981); Patterson v. Weinberger, 644 F.2d 521, 523-524 (5th Cir. 1981).

Federal regulations at the time required the plaintiff to consult with an EEO counselor within thirty (30) calendar days "of the date of the alleged discriminatory event." 29 C.F.R. § 1613.214(a)(i). The plaintiff did not comply with this requirement on at least four of his claims:

1) claims arising from administrative case no. 3-C-1062-91, contained in the plaintiff's Fourth Amended Complaint, ¶¶ 6-7. The alleged constructive discharge occurred in September of 1988, but the plaintiff did not request counselling until March 7, 1991.

2) claims arising from administrative case no. 3-C-1046-92, contained in the plaintiff's Fourth Amended Complaint, ¶¶ 8-9. The relocation complained of occurred in December of 1990, but the plaintiff did not request EEO counselling until October 24, 1991.

3) claims arising from administrative case no. 3-C-1089-91, contained in plaintiff's Fourth Amended Complaint, ¶¶ 10-11. Plaintiff was first required to affix stamps for his rural route customers when he became a rural carrier, but did not file his EEO complaint until July 1, 1991.

4) claims arising from administrative case no. 3-C-1091-91, contained in plaintiff's Fourth Amended Complaint, ¶¶ 14-15. The plaintiff alleged interference with his Worker's Compensation Claim

in September of 1990, but did not seek EEO counselling until July 1, 1991.

It is obvious to this court that as to these four sets of claims, the plaintiff did not properly comply with the statutory time requirements. However, unlike the time limits for filing a complaint in district court, the time limits of Title VII for filing an **administrative** complaint are subject to equitable tolling. Munoz, 894 F.2d at 1494; Oaxaca v. Roscoe, 641 F.2d 386, 391 (5th Cir. 1981). This court is of the opinion that the plaintiff is not entitled to have any of these limitations periods equitably tolled in his favor. The plaintiff failed to consult an EEO counsellor until months, and sometimes years, later than that required by the Code of Federal Regulations. There are no legitimate explanations by the plaintiff as to why the regulations were not complied with, and there appears to be no justification for treating these incidents as "continuing violations" as the plaintiff suggests, and thereby allowing the plaintiff to circumvent the regulatory requirements. There is no genuine issue as to any material fact with regard to these claims, and the defendants are entitled to a judgment as a matter of law.

### III. THE PLAINTIFF'S CLAIMS WHICH ARE MOOT

Prior to the Civil Rights Act of 1991, punitive and compensatory damages were not available as relief under in a Title VII action. See, e.g., Bennett v. Carron & Black Corp., 845 F.2d



104, (5th Cir. 1988). The Civil Rights Act of 1991, however, provides for the award of compensatory damages under certain circumstances in Title VII or Rehabilitation Act cases. 42 U.S.C. § 1977 a(a)(b). Further, this relief is not available for any conduct which occurred before November 21, 1991, the effective date of the Act. Landgraf v. USI File Products, 968 F.2d 427, 432 (5th Cir. 1992). Therefore, any claims that the plaintiff might have which arise out of conduct occurring before November 21, 1991 would entitle him to only equitable relief.

The plaintiff has been reassigned from his rural letter carrier position in Ripley, Mississippi to the post office in Oshkosh, Wisconsin, where he serves as an electronics technician. This reassignment makes the granting of equitable relief by this court on several of his claims unnecessary. This in conjunction with the fact that even if successful he would be unable to recover monetary damages on several of his claims, makes those claims moot because there is no relief that this court could award. There is no information before this court to indicate, and the plaintiff has not even asserted, that the alleged violations of the defendants originated anywhere other than the particular post offices in which he worked in Mississippi. In that he is no longer employed in those offices, it cannot be said that there is a reasonable expectation that these alleged violations will reoccur. See County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979); Valdez v.

Church's Fried Chicken, 683 F.Supp. 596, 621 (W.D. Tex. 1988). Any of the plaintiff's claims which arose from conduct which occurred before November 21, 1991, and for which equitable relief would now be unnecessary, have become moot and are properly dismissed. These claims encompass several which are being dismissed by this court on other grounds, but also include:

1) claims arising out of administrative case no. 3-C-1092-90, contained in the plaintiff's Fourth Amended Complaint, ¶ 17. The plaintiff asserts that the defendants attempted to controvert a worker's compensation claim and attempted to have the plaintiff arrested for tampering with mailboxes. The administrative complaint was filed on August 10, 1990.

2) claims arising out of administrative case no. 3-C-1045-91, contained in the plaintiff's Fourth Amended Complaint, ¶ 17. The plaintiff asserts that he was improperly required to provide medical documentation for one day of sick leave. The administrative complaint was filed on March 7, 1991.

3) claims arising out of administrative case no. 3-C-1076-91, contained in the plaintiff's Fourth Amended Complaint, ¶ 17. The plaintiff asserts that he was not selected for the position of ad hoc rural carrier instructor based upon his religion and prior EEO activity.

4) claims arising out of administrative case no. 3-C-1077-91, contained in the plaintiff's Fourth Amended Complaint, ¶ 17.

The plaintiff asserts that he was improperly required to undergo a fitness for duty examination after he made statements relative to homicide and suicide.

#### IV. PLAINTIFF'S CLAIM FOR BREACH OF CONTRACT AND BREACH OF THE DUTY OF FAIR REPRESENTATION

The plaintiff has also asserted a claim against both defendants for breach of contract, and asserted a claim against defendant National Rural Letter Carriers Association for breach of the duty of fair representation. These claims are contained in paragraphs twenty (20) through twenty-three (23) of the plaintiff's Fourth Amended Complaint. The date designated by the plaintiff for these breaches is November of 1990. Any state law contract claims are preempted by federal law in this situation, and the statute of limitations applicable to these claims is a period of six months. Del Costello v. Teamsters, 462 U.S. 151, 169-72, 103 S.Ct. 2281, 2293-95, 76 L.Ed.2d 476 (1983); Nelson v. Local 854 Dock Workers, 993 F.2d 496, 498 (5th Cir. 1993); Wood v. Houston Belt & Terminal Ry., 958 F.2d 95, 97 (5th Cir. 1992). Mr. Bigsby did not file his original complaint in this cause until January 28, 1992. These claims are barred by the statute of limitations, and are therefore properly resolved on a motion for summary judgement. There is no genuine issue of material fact with regard to these claims, and the defendants are entitled to a judgment as a matter of law with regard to them.

#### V. THE PLAINTIFF'S CLAIMS OF DISCRIMINATION

Although many of the plaintiff's claims need not be addressed by this court on their merits, there remain several claims of discrimination which must be discussed. These claims are:

1) claims arising from administrative case no. 3-C-1100-92, contained in plaintiff's Fourth Amended Complaint, ¶ 17.

2) claims arising from administrative case no. 3-C-1091-90, as contained in plaintiff's Fourth Amended Complaint, ¶ 17.

3) claims arising from administrative case no. 3-C-1101-90, as contained in plaintiff's Fourth Amended Complaint, ¶ 17.

4) claims arising from administrative case no. 3-C-1090-91, as contained in plaintiff's Fourth Amended Complaint, ¶ 17.

5) claims arising from administrative case no. 3-C-1032-92, as contained in plaintiff's Fourth Amended Complaint, ¶ 17.

The plaintiff must properly assert those claims and provide sufficient evidence to this court to avert a grant of a judgment as a matter of law in favor of the defendants. It is not necessary for this court to analyze each element of each type of discrimination claim that Mr. Bigsby has asserted in this action. In order to establish a prima facie case of discrimination under any of his potential claims, he must show that there was intentional discrimination by the defendants by virtue of his status (be it age, sex, religion or otherwise).

"When faced with a properly supported motion for summary judgment, a non-movant, such as plaintiff, cannot merely 'sit back

and wait for trial.'" Hinton v. Teamsters Local Union No. 891, 818 F.Supp. 939 (N.D. Miss. 1993) (quoting Page v. De Laune, 837 F.2d 233, 238 (5th Cir. 1988)). As in Hinton, Mr. Bigsby must "come forward with affirmative evidence creating a factual issue on his claim that he was treated differently" because of his handicap, age, or religious belief. Hinton, 818 F.Supp. at 944. Mr. Bigsby has responded to the defendant's motions for summary judgment, but has done nothing but make conclusory allegations concerning the motivation of the defendants in the employment decisions affecting him. This is insufficient to survive a properly-made motion for summary judgment on these issues. Again, as this court has noted in Hinton:

[the] plaintiff's attempts to create a genuine issue of material fact suggest only an "'attenuated possibility that a jury would infer a discriminatory motive,'" Thornborough v. Columbus & Greenville Railroad Co., 760 F.2d 633, 645 n. 19 (5th Cir. 1985) (citation omitted), . . . Furthermore, a party against whom summary judgment is sought cannot raise a fact issue simply by "asserting a cause of action to which state of mind is a material element. There must be some indication that he can produce the requisite quantum of evidence to enable him to reach the jury with his claim." Clark v. Resistoflex Co., A Division of Unidynamics Corp., 854 F.2d 762, 771 (5th Cir. 1988) (citation omitted). In this case, the "'possibility of a jury drawing a contrary inference sufficient to create a dispute as to a material fact does not reify to the point even of a thin vapor capable of being seen or realized by a reasonable jury.'" Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 814 (5th Cir. 1991) (citation omitted).

Hinton, 818 F.Supp at 944. Mr. Bigsby has not even offered evidence or asserted that other employees were treated differently under the same or similar circumstances. Further, there is no

circumstantial evidence before this court that would indicate a discriminatory intent on behalf of the defendants. Based on the pleadings and matters presented, this court can find no genuine issue of material fact as to the plaintiff's remaining claims of discrimination or as to any other of the plaintiff's claims, and is of the opinion that the defendants are entitled to a judgment as a matter of law.

A separate order shall issue this day.

This, the \_\_\_\_\_ day of December, 1994.

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United States District Judge

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Postmaster General; UNITED  
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DEFENDANTS

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

This matter is before the undersigned on the separate motions of the defendants in this cause. Upon through review of all of the numerous pleadings and submissions in this case, this court concludes that the defendants' motions are well taken and should be granted. This court finds that there are no genuine issues of material fact and that the defendants in this case are entitled to judgment as a matter of law. Therefore, it is hereby ORDERED THAT:

1) the motion of the defendants Postmaster General and the United States Postal Service for summary judgment is hereby GRANTED.

2) the motion of the defendant National Rural Letter Carriers Association for summary judgment is hereby GRANTED.

3) the motions of the plaintiff Robert Bigsby for summary judgment are hereby DENIED.

All memoranda, depositions, affidavits and other matters

considered by this court in granting the defendants' motions for summary judgment and denying the plaintiff's motions for summary judgment are hereby incorporated and made a part of the record in this cause.

This, the \_\_\_\_\_ day of December, 1994.

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United States District Judge